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No. 135

In the Supreme Court of the United States

October Term, 1962

Dennis Avery Williams, Petitioner

v.

Eugene M. Zuckert, Secretary of the Air Force, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
JOHN W. DOUGLAS,
Assistant Attorney General,
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DANIEL ALTON WILLIAMS, PETITIONER

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EUGENE M. ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO PETITION FOR REHEARING

From the beginning of this case, petitioner's primary contention has been that the Air Force had an obligation to produce for confrontation and cross-examination at the Civil Service hearing the witnesses whose affidavits supplied the factual basis for his removal (Pet. Br. 5). The Court, in dismissing the writ as improvidently granted, squarely rejected this contention. It recognized, however, that circumstances might arise where the Air Force, although permitted to proceed by written statements, would be obliged to produce witnesses for examination by the employee. The Court defined such circumstances by reaffirming first that "the party desiring the presence of wit-

nesses, either for direct or cross-examination, shall assume the initial burden of producing them" (371 U.S. at 532). The Court then stated that, if an employee "discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own failed, then * * * the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available and under the Air Force's control" (371 U.S. at 532–533).

Thus the Court's opinion develops two propositions. Although both use the ambivalent expression "production of witnesses," the distinction between them is important. The first proposition has to do with the "production" of live witnesses as part of the case to be made by the discharging agency. The Court held that the controlling statutes and regulations do not impose that duty. The second proposition has to do with the Air Force's obligation to "produce" witnesses, in the sense of enabling the discharged employee to call them, by exercising its authority or influence over enlisted men under its control.

Until the petition for rehearing, petitioner built his case under the first head, arguing that the employing agency had a duty, as part of its own case, to produce live witnesses. Having failed on this ground, petitioner now abandons his former contention and attempts to show that his case falls within the second proposition as defined by the Court in its *per curiam* dismissal. On the basis of new materials which were not in the record before the Court, petitioner now argues essentially that he brought himself within the

Civil Service regulations as interpreted by this Court, by making a request for the production of the witnesses in an affidavit given to a Civil Service investigator seven days prior to the hearing. We submit that the petition for rehearing should be denied, *first*, because petitioner, upon his own statement, did not discharge his "initial burden," and, *second*, because petitioner is attempting to introduce a new theory upon petition for rehearing different from that on which he presented his case in the trial and appellate courts and, requiring the resolution of disputed questions of fact upon evidence not before the Court.

I.

THE FACTS ALLEGED BY PETITIONER ARE IRRELEVANT BECAUSE HE NEVER REQUESTED THE WITNESSES TO APPEAR AT THE HEARING

Assuming for the moment that the facts are correctly stated in petitioner's supplementary affidavits, they do not establish a legal basis for relief under the Court's decision, for he never assumed the "initial burden." Petitioner never attempted to reach the witnesses to arrange for them to appear. The opinion of the court of appeals states (R. 101):

> Appellant concedes he did not request the three Airmen to attend the hearing; he concedes he does not know whether, if asked, they would have attended or if they attended how they would testify. Appellant has thus failed to use available administrative means to arrange for the appearance of witnesses as provided by the Civil Service Commission Regulations. * * *

The petition for rehearing in no way challenges these facts.

Thus, on the facts, *as petitioner concedes them to be,* there is no ground for rehearing or for further proceedings in any court in this case. Petitioner has argued the case on the assumption that he was entitled either by regulation or statute or under the Constitution to a trial-type proceeding before the Civil Service Commission and that it was the Air Force's duty to produce live witnesses as part of its case.[1] Consistent with that position, petitioner never requested the three witnesses to attend the hearing but contented himself with a demand that the Air Force produce them for confrontation and cross-examination. Petitioner never assumed the "initial burden" which the regulations placed squarely upon his shoulders and which this Court upheld as valid in its opinion dismissing the writ. Under the circumstances, the facts which petitioner has attempted to place before the Court since its decision are legally

[1] That this was petitioner's view of the case is confirmed by the letter he addressed to the Court on the day following the oral argument which states:

"3. The government's brief points out that the Commission has interpreted its regulations as allowing "the removing agency to rest its case on written statements and to impose on the appealing employee the burden of making his own arrangements for the appearance of all witnesses he wishes to present, including witnesses who have supplied evidence adverse to him" (Res. Br. 22–23). The issue is whether that interpretation, which was followed in this case (R. 100–101), violated Section 14 of the Veterans Preference Act, 5 U.S.C. § 863, and the applicable Civil Service regulations, 5 C.F.R. § 22.601, *et seq.*"

irrelevant and call for no change in the disposition of the case.

II

THE PETITION FOR REHEARING IMPROPERLY ATTEMPTS TO INTERJECT A NEW THEORY DIFFERENT FROM THAT ON WHICH PETITIONER PRESENTED HIS CASE IN THE TRIAL AND APPELLATE COURTS AND REQUIRING THE RESOLUTION OF DISPUTED QUESTIONS OF FACT UPON EVIDENCE NOT IN THE RECORD

In view of petitioner's attack upon the representations made by the Solicitor General on behalf of the United States, we have made a careful investigation of the circumstances known to government personnel concerning the absence of live witnesses from the hearing. The investigation makes it apparent that petitioner's belated claim that the government failed in its duty to assist him to call the witnesses not only interjects an issue not raised on the record, but also would involve the detailed analysis and drawing of inferences from a substantial body of evidence none of which was in the record before the Court. The investigation convinces us that petitioner never made any request upon the Air Force directly, and no request indirectly, that gave fair notice that he wished the Air Force to assist in the obtaining of witnesses whom he desired to call at the trial. It would lead us, on a trial of the facts, categorically to deny some of the facts alleged in the petitioner's affidavits and to challenge the interpretation he puts upon the incidents. The Court, however, need not, and should not be called upon to determine whether our conclusion is correct. For the fact is that petitioner's

present theory, that the government failed in a duty to help him get witnesses whom he wished to call, is a departure from everything preceding.

Throughout the proceedings in this Court, it has been the position of the Air Force, stated in the briefs (Br. in Op. 7–9; Br. 14–15, 17–21) and in oral argument, that the Civil Service regulations required petitioner to make his "own arrangements for the appearance of witnesses" (5 C.F.R. 22.607), that he did not request the witnesses to attend the hearing, that the Air Force raised no impediments to their appearance[2] and that, therefore, he was entitled to no relief. As pointed out above, the affidavits filed as part of the petition for rehearing do not in any way dispute the facts on which we relied in taking this position.

At the oral argument, a number of questions were raised as to the position which the Solicitor General would have taken had different facts been presented. In elaborating on the answers to such questions, the

[2] Petitioner urged in his brief (Br. 2) and in oral argument that he did not avail himself of the opportunity offered for a personal appearance before the Office of Civilian Personnel (R. 17) and was otherwise hampered in the presentation of his case because the Provost Marshal had issued an order excluding him from the base (R. 18–19). At the oral argument we pointed out that petitioner was represented by counsel who was free to enter the base. In the course of our recent inquiry into the extra-record circumstances, we have learned that the order excluding him from the base was modified in order to allow petitioner access to the Civilian Personnel Office for the purpose of seeking advice or replying in person to the notice of removal. Petitioner was officially informed of this modification of the suspension order by a representative of the Academy.

Solicitor General, on the afternoon of the oral argument, filed a letter with the Clerk of the Court stating in pertinent part:

> 1. Under the Veterans Preference Act and the applicable Civil Service regulations, the employing agency has no obligation to call witnesses to make its case in support of a discharge. The employing agency may rely upon affidavits. The governing regulations make it the obligation of the discharged employee to arrange for the presence of such witnesses as he may desire.
>
> 2. An employing agency could not lawfully place any impediments in the way of the discharged employee's arranging for the presence of any witness. Under the announced policy set forth in its regulations the Air Force would not have stood in the way of the appearance of the witnesses in question, and at the request of the discharged employee it would have facilitated their appearance.
>
> 3. The Air Force raised no impediments in the present case. Petitioner did not attempt to communicate with the witnesses or request the Air Force to produce them prior to the hearing.
>
> 4. The Air Force regulations and statements of policy give me every reason to believe it would have required the three men in question to appear if the petitioner had requested it to do so.
>
> 5. Under some circumstances it is possible that a discharged employee might request a witness who has given an affidavit against him to appear for cross-examination; the witness

might refuse; the employing agency (unlike the Air Force) might be unable or unwilling to take action and the discharged employee might then request the Commission's Examiner to disregard the affidavits. The present case does not raise this problem. The Civil Service Commission has never had occasion to decide what course the statute, regulations and applicable principles would require it to follow in these circumstances. Under such circumstances, it would seem improper for me to make any representation to the Court at this stage concerning the government's position if such a case were to arise.

The petition for rehearing takes issue with paragraphs three and four of this letter. In so doing, it relies upon an affidavit of petitioner dated April 28, 1959, as well as affidavits executed in February 1963—following the Court's dismissal of the case—by petitioner's counsel and by Curtis L. Stevens, one of the Airmen whom petitioner wished to examine at the Civil Service hearing. In the affidavit of April 28, 1959 (Pet. Reh. 5–7), which was executed as part of the Civil Service investigation of the case, petitioner stated, *inter alia:*

> * * * I further request that the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination on May 5, 1959 at 9:00 A.M. since the said Tyler is under the jurisdiction of the employing agency and subject to its commands as a military person, which power to require

his attendant [sic] is not available to me by subpoena or available to the commission.

* * * * *

It is further requested that A 2c Patrick J. Ryan and A 2c Curtis L. Stevens also be present at the hearing scheduled May 5, 1959 at 9:00 A.M. on the same grounds as herein asserted for the presence of SSGT Alton Tyler.

Petitioner's counsel, Irving P. Andrews, states in his affidavit that on April 28 he "formally requested [the Civil Service investigator, Mr. Robert M. Sefranka] to convey, personally, the [petitioner's] affidavit * * * to the appropriate officials of the Air Force Academy * * *" (Supp. 1a). Mr. Andrews states further that some time between April 28 and prior to May 5, the day of the Civil Service hearing, Mr. Sefranka advised him "by telephone that the demand for the production of witnesses had been rejected by Captain Roger P. Fox, Provost Marshal and spokesman for the Superintendent of the Air Force Academy, and Mrs. Josephine Dillon, spokesman for the Director of Civilian Personnel, Mr. James E. Dodson, had similarly negatived the [petitioner's] request" for the production of the alleged government witnesses (Supp. 1a–2a),[3]

[3] This statement is contrary to the facts stated by petitioner's counsel in his post-argument letter to the Court dated December 14, 1962. There, petitioner's counsel stated:

"Airmen Tyler and Ryan, who had furnished affidavits against petitioner (R. 71, 78, 91), were hostile witnesses and petitioner had no reason to know prior to the hearing that they would not appear."

In his affidavit, Airman Stevens states that on April 24, 1959, he met with Josephine Dillion, Assistant Director of Civilian Personnel of the Academy, Captain Roger P. Fox, Provost Marshal, and Mr. Sefranka and was "interrogated" concerning his knowledge of the charges against petitioner. He states that he "signed an Affidavit summarizing a part of my testimony given in the presence of these three persons."[4] Mr. Stevens also states that he was advised by Captain Fox at a later meeting that the affidavit "would be adequate for the purposes of the hearing on May 5, 1959, and that my personal appearance there would not be necessary" (Supp. 3a).

On the basis of these affidavits, petitioner's counsel argues that "the Solicitor General's post-argument representations" were in error and that he should now be accorded an opportunity to demonstrate that "he '[brought] himself within' the regulations as construed by this Court" (Pet. Reh. 4; Supp. 2). It should be noted that petitioner does not assert that any request was addressed by him or his counsel to the Airmen whom they wished to be present at the hearing. The claim is solely that such a request was made in the body of the April 28 affidavit given to the Civil Service investigator, that the investigator was requested to convey the affidavit to the Air Force officials and that some time prior to the hearing petitioner was advised by the investigator that the "demand" for the appearance of the witnesses had been rejected by Captain Fox and Mrs. Dillion.

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[4] A copy of Mr. Stevens' affidavit is attached hereto as Appendix A.

Had all the alleged facts and petitioner's interpretation of them been known, the Solicitor General would (or at least, should) have framed paragraphs 3 and 4 of his letter differently. Those paragraphs were intended to refer to requests to have the three men present so that petitioner could call them as witnesses, the Air Force's lack of obligation to present a live case having been dealt with in paragraph 1 and the problem of making witnesses available for the petitioner to call as part of his case being taken up in paragraphs 2, 3, 4 and 5. It still seems, to us, although we may not be the most objective judges, that that is quite plainly the meaning of the paragraphs in question, and that it was, therefore, and is, an accurate statement in all respects. At the time the letter was written there seemed to be no occasion to focus upon the distinction between a request that the Air Force produce witnesses for petitioner to call and the very different request that the Air Force produce the men as its witnesses instead of relying on their affidavits. We had no information either from the Supreme Court record or the government's files that any request of any kind had been communicated to the Air Force prior to the hearing. The Air Force did not understand—quite rightly, we think—that petitioner had ever, even indirectly, requested it to assist him in calling the witnesses by producing them, *i.e.*, having them present *for him to call* at the hearing. See pp. 12–18 below. Since it now appears that a request that the Air Force produce live witnesses as part of its case was probably communicated to the Air Force through Sefranka, it is regrettable that we did not

focus on the distinction so that no possibility of misunderstanding could occur.

Following receipt of petitioner's post-argument affidavits, the Solicitor General undertook a full investigation to determine the relevant facts. The entire Civil Service files were reviewed. The Civil Service investigator, Mr. Sefranka, was brought from Albuquerque, New Mexico, for interview. The Air Force personnel named in the affidavits, Captain Fox, Mrs. Dillion and Mr. Dodson, were brought from Colorado.

For the Court's information, we state the facts disclosed by each of these witnesses. However, we emphasize that we do not concede either that this information detracts from the legal basis of the Court's holding (see Part I, *supra*) or that it is appropriate at this late juncture, after all appeal procedures have been completed, to retry this case on the basis of facts available to petitioner but not made a part of the record, and upon a theory which was not urged throughout the proceedings.

MRS. JOSEPHINE DILLION—

Mrs. Dillion was the Civilian Personnel Officer assigned to the Williams case. Prior to the Civil Service hearing on May 5, 1959, neither petitioner nor his counsel ever spoke to her. As far as she knows, neither petitioner nor his counsel attempted to communicate with her to discuss the charges or the production of witnesses at that hearing.

Although Mrs. Dillion signed a statement dated April 29, 1959, that she had "been advised of the evidence obtained in the investigation of the appeal of

Daniel A. Williams * * * as presented to me by a Civil Service Commission representative," she stated that she first saw petitioner's affidavit of April 28 in connection with this inquiry by the Solicitor General.

It was on the afternoon of May 4 that Mrs. Dillion first heard that petitioner wished the Air Force to present witnesses at the Civil Service hearing. She received a telephone call from Mr. Sefranka, who advised her that he was communicating for petitioner's counsel who had expressed a desire that the Air Force produce three Air Men at the hearing. She recalls stating that the Air Force might not be able to round up the men upon such short notice and asking Mr. Sefranka if their presence would serve a useful purpose since they had each given statements and whether production was being requested by the Commission. Mr. Sefranka replied that, as a Civil Service representative, he was required to remain neutral and was not in a position to advise her. He said that there was no official Commission request that the men be present.

After a conversation with her supervisor, Mr. Dodson, the Civilian Personnel Director, Mrs. Dillion telephoned the Civil Service Appeals Examiner, Mr. Charles W. Hoover, to advise him of the call received from Mr. Sefranka and to ask if the Commission was requesting the presence of the men. Mr. Hoover said that this was a matter left for decision by the Air Force and that the Commission did not encourage the bringing of witnesses unless they had something to add which was not included in the statements they had given to the investigator. Following this con-

versation, Mrs. Dillion and Mr. Dodson determined not to attempt to present the witnesses at the hearing. She did not communicate this decision to Mr. Sefranka, to petitioner or to his counsel, nor was she asked by anyone to do so.

CAPTAIN ROGER P. FOX—

Captain Fox was Provost Marshal of the Academy during the period in question. He participated in the investigation of the complaints which led to the charges against petitioner and to petitioner's removal on April 12, 1959. He attended the Civil Service hearing with Mrs. Dillion and answered questions. Prior to that time, he had never seen or spoken with petitioner or his counsel, Mr. Andrews.

Captain Fox recalls only one meeting with the Civil Service investigator, Mr. Sefranka. He cannot place the date. At this meeting, which was also attended by Mrs. Dillion, Mr. Dodson, a Captain Ryan and possibly a Mr. Baker of Dodson's office, there was no discussion or mention of the question whether the Air Force would produce witnesses at the Civil Service hearing. Captain Fox had no other conversations with Mr. Sefranka. He never discussed petitioner's affidavit of April 28 or the request contained therein with Mr. Sefranka or with anyone else. Captain Fox does not know whether he saw this affidavit prior to the hearing. Captain Fox, who is not an attorney, had no responsibility, either formal or informal, for decisions concerning the presentation of the Air Force's case against petitioner at the Civil Service hearing. He made no decision whether the

Air Force would produce witnesses and never discussed this question with Mr. Sefranka, petitioner or his counsel.

Captain Fox disagrees with the statements in the affidavit of ex-Airman Stevens. Captain Fox states that he did not attend a meeting with Mr. Sefranka and Mrs. Dillon at which Stevens was interrogated and signed an affidavit summarizing any portion of his testimony. Captain Fox states that he was not present when any statements were taken by Mr. Sefranka from anyone and that he took none himself in this case following the preferring of the charges against petitioner on or about March 11, 1959. Captain Fox had never seen Stevens' affidavit of April 24, 1959, prior to March 1963. Captain Fox states that it is inconceivable that he advised Stevens that this affidavit would be adequate for the hearing on May 5 and that his personal appearance would not be necessary. To have given such advice would have been wholly outside Captain Fox's responsibility as Provost Marshal.[5]

[5] It would not have been unreasonable for someone to have given such advice to Airman Stevens, since he stated in his affidavit (attached hereto as Appendix A):

"I have no personal knowledge of the alleged attempted assault and have no firsthand knowledge of the other incidences and charges contained in the letter of proposed adverse action.

"I have read the above statement consisting of one page which is true and complete to the best of my knowledge and belief."

Airman Stevens, who was interviewed by Mr. Sefranka at petitioner's request, was not a witness upon whose statements the Air Force relied. By his own admission under oath, he had no knowledge of the charges. It seems clear that under any interpretation of the regulations, the Air Force had no obligation to present this witness for cross-examination.

JAMES E. DODSON—

Mr. Dodson, Director of Civilian Personnel of the Academy at the time pertinent to this case, never spoke with Williams, his counsel, Mr. Andrews, or with any witnesses in this case prior to the Civil Service hearing. He had one conversation, irrelevant to the issues here, with Mr. Sefranka, and at no time advised him whether the Air Force would or would not produce witnesses at the Civil Service hearing.

Mr. Dodson recalls that Mrs. Dillion, prior to the Civil Service hearing, advised him that she had received a telephone call from Mr. Sefranka raising a question concerning the production of witnesses at the hearing. Mrs. Dillion stated that she hoped to clarify the Civil Service position by calling the examiner, Mr. Hoover. He gave Mrs. Dillion permission to make this call.

Mr. Dodson saw none of the affidavits obtained by Mr. Sefranka in his investigation of this case at any time prior to the Civil Service hearing.

ROBERT M. SEFRANKA—

Mr. Sefranka was assigned as an investigator to this case on April 16, 1959. He completed his investigation of the case on April 30. Mr. Sefranka was normally assigned as investigator to thirty or forty cases at one time.

On April 23, Mr. Sefranka met with petitioner and his counsel at the latter's office to afford them an opportunity to review the affidavits which he had obtained to date. Petitioner executed an affidavit.

On April 24, Mr. Sefranka interviewed Airman Stevens at the request of petitioner. Captain Fox was not present at this interview.

On April 28, Mr. Sefranka met again with petitioner and his counsel at the counsel's office. Counsel, in Mr. Sefranka's presence, dictated a statement which petitioner signed under oath and which has been filed as Exhibit A to the petition for rehearing. Mr. Sefranka recalls no formal or informal request that he convey this affidavit personally to the officials of the Air Force, although he states that this would have been his regular procedure since it was his responsibility to disclose to all parties the affidavits obtained in the course of his investigation.

The following day, Mr. Sefranka made the affidavits he had obtained from petitioner and other witnesses available for review by Air Force personnel. He did not mention the request that actual witnesses be presented, which was contained in the body of the Williams affidavit. On April 30, Mr. Sefranka met once more with petitioner and his counsel. Petitioner executed a further affidavit responding to Mrs. Dillion's affidavit of April 29, but made no mention of a desire for witnesses. Petitioner's affidavit is attached hereto as Appendix B.

Mr. Sefranka recalls; at some point prior to the Civil Service hearing, a discussion with petitioner and his counsel concerning th production of witnesses by the Air Force. He advised them that the Commission had no subpoena power, that the Air Force was

not required to produce witnesses, that the Commission could not force it to do so, and that arrangements for the production of witnesses should be made between the employee and the employing agency.

Mr. Sefranka does not recall telephoning petitioner's counsel to advise him that his request concerning witnesses had been rejected. He does recall a discussion at some time prior to the hearing in which he informed Air Force personnel that petitioner and his counsel desired the Air Force to produce certain witnesses. He recalls that the Air Force made a point of the fact that one of the witnesses was no longer at the Academy. He advised the Air Force officials that it was within their discretion whether to produce witnesses and that they were not required to do so; but he gave no advice as to whether they should comply with the request. He does not recall whether the Air Force advised him whether or not they would produce witnesses at the hearing.

* * * * *

Taking all the non-record evidence now available in the light most favorable to petitioner, we believe that it reveals that he executed an affidavit for the Civil Service investigator in which he requested the Air Force to present certain witnesses; that he never directly communicated with any Air Force personnel to request it to aid him to obtain the witnesses; and that he did not in any way intimate (which would be contrary to fact) that he, himself, had been unable to procure their attendance at the hearing. This non-record evidence reveals further that the Air Force,

when advised of petitioner's desire for witnesses, quite naturally regarded this as a request that it present at least a portion of its case through live witnesses. Being uncertain as to its obligations in this regard, the Air Force personnel asked advice from the Civil Service investigator and the examiner, each of whom, consistent with regulations approved by this Court in the opinion in this case, advised that there was no such requirement.

The interpretation which Mrs. Dillion and, indirectly, Mr. Dodson placed upon Williams' request was entirely natural. Williams' affidavit complained that the affidavit of Sgt. Tyler (Pet. Reb. 5)—

> is totally irrelevant and prejudicial in that the alleged report made by said affiant was hearsay to me * * *.

He then went on to request that—

> the good faith of the employing agency be demonstrated by presenting SSGT Alton Tyler at the hearing before the Hearings Examiner for cross-examination * * *.

pointing out that Tyler was under the jurisdiction of the employing agency and not available to him by subpoena or other commission. There is no suggestion that Williams had requested Tyler to appear and no explicit statement that he desired to call him as a witness. Whatever may have been Williams' subjective intent, Mrs. Dillion and the Air Force authorities certainly acted reasonably in understanding that their duty to present the evidence through live witnesses was the only thing in question and the only matter being urged.

As we have stated before to this Court, we believe that if petitioner or his counsel had advised the officials of the Air Force that they could not reach the Airmen whom they wished to examine at the hearing or needed other assistance in obtaining their presence, the Air Force would have readily given such assistance. Any other action would be contrary to the Air Force Regulations (32 C.F.R. 804.403) which specifically provide:

> § 804.403 *Air Force policy.*
>
> Official information will be made available for use in litigation, and military and civilian personnel will be permitted to testify concerning such information in its files if material and relevant to the litigation, unless the information is classified defense information, is privileged by law or regulation, or other valid reason exists for its nonrelease.

Further, the Air Force has no policy to deny discharged employees an opportunity for confrontation and cross-examination of witnesses. In this very case, in accordance with its regulations, it had offered this petitioner an opportunity for review of his removal under the grievance procedures established by Air Force Manual 40–1, Chapter E2. This chapter specifically provides that the employee may inform the Air Force of the names of witnesses he wishes to examine and the Air Force will, in the case of Air Force employees, require them to be present.[6]

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[6] Paragraph 10 of Air Force Manual 40-1, which establishes the grievance procedures, states:

* * * * * *

"g. The committee has no authority to compel witnesses to give testimony. However, if necessary to insure adequate presenta-

Neither the Supreme Court record nor the extra-record materials reviewed by the Solicitor General indicate any unwillingness to aid petitioner in procuring any witnesses whom he wished to call. Rather, the Air Force was proceeding, as petitioner himself has recognized in his letter of December 14 to this Court (see *supra*, p. 4, n. 1), in the belief that it was permitted by Civil Service regulations to rely on written statements and to leave to the employee the responsibility for making his own arrangements for the appearance of witnesses he wished to present.

As stated above, we believe that it is not incumbent upon this Court to analyze affidavits and statements of what witnesses would say upon an issue that was never presented in the courts below, nor in this Court prior to the petition for rehearing. If there were a clear-cut showing of injustice, perhaps the error could be corrected, however late. But petitioner does not make such a showing. He was advised by counsel throughout (see R. 27). He never claimed that the

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tion of testimony for either the complainant or the person complained against, the committee will request appropriate administrative authority to require the attendance of Air Force employees as witnesses.

"h. The committee may entertain a request from the complainant and other persons giving testimony to call other witnesses in addition to those originally produced. If this request is made, the committee may require an explanation of the purpose and the basis for the request and an indication that the testimony of the witness or witnesses requested will be competent, relevant, and material to the case. The committee, in its discretion, may decide not to call any additional witness if it considers the action unnecessary to a fair consideration of the grievance or otherwise impracticable for clearly demonstrable reasons."

See also p. 4, fn. 2, of the brief for the respondents.

Air Force failed to respond to a request for assistance in procuring the attendance of witnesses whom he wished to call. The latter question was suggested only when the government, in an effort to define exactly the case before the Court, indicated that the Air Force would have rendered such assistance if it had been requested. The suggestion that such a request was in fact made and refused is far too tenuous to entertain at this late stage in the case.

Since petitioner chose not to assume the initial burden of attempting to reach the witnesses and to arrange for their appearance, he did not bring himself within the regulations. There was, therefore, no violation of his rights and no unfairness.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for rehearing should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

STEPHEN J. POLLAK,
Assistant to the Solicitor General.

ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys.

MARCH 1963.

APPENDIX A

Affidavit

STATE OF COLORADO
County of El Paso
City of Colorado Springs

I, *Curtis L. Stevens, Airman Second Class,* of the United States Air Force Academy, being duly sworn, make this statement of my own free will, without any promises or assurances:

Reference to letter of proposed adverse action dated March 11, 1959 addressed to Daniel A. Williams of 607 North Spruce Street, Colorado Springs, Colorado, and to specific charge contained therein dated February 11, 1959, of an attempted homosexual assault of A/2C Patrick J. Ryan at 607 North Spruce Street, Colorado Springs, Colorado. I was present at the above address on the night of February 11, 1959 and I was present when a telephone call was made and Mr. Williams told me that it was Airman Ryan who wanted to come over and later during the evening Airman Ryan arrived. About the time Airman Harris and myself were about to go, Airman Ryan made a statement to the effect that he would like to remain longer to discuss a business deal concerning the selling of a Presto-Pride cook wear. Airman Harris and I departed and Airman Ryan remained. I have no personal knowledge of the alleged attempted assault and have no first hand knowledge of the other incidences and charges contained in the letter of proposed adverse action.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

Curtis L. Stevens
CURTIS L. STEVENS, *A/2C, USAF Academy*

Subscribed and sworn to before me at Colorado Springs, Colorado, this 24th day of April, 1959.

Robert M. Sefranka
ROBERT M. SEFRANKA, *Investigator,*
U.S. Civil Service Commission

APPENDIX B

Affidavit

STATE OF COLORADO
County of Denver ,

I, Daniel Alton Williams, residing at 1830 East 39th. Avenue, Denver, Colorado, being duly sworn; make this statement of my own free will, without any promises or assurances:

I have been advised of the evidence obtained in the investigation of my appeal under Section 14 of the Veterans' Preference Act of 1944, as presented to me by a Civil Service Commission representative. I have no further evidence to present except, objections to the consideration of the affidavit of Mrs. Jean DeSmet, on the grounds that the same is not evidentiary in nature but is in essence argument, and same objection is hereby made to affidavit of Josephine L. Dillion, dated April 29, 1959.

I have read the above statement consisting of 1 page, which is true and complete to the best of my knowledge and belief. I further understand that the information I have given is not to be considered confidential and that it may be discussed with or shown to the interested parties.

Daniel A. Williams
DANIEL ALTON WILLIAMS.

Subscribed and sworn to before me at Denver, Colorado, this 30th. day of April, 1959.

Robert M. Sefranka
ROBERT M. SEFRANKA, *Investigator,*
U.S. Civil Service Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1960